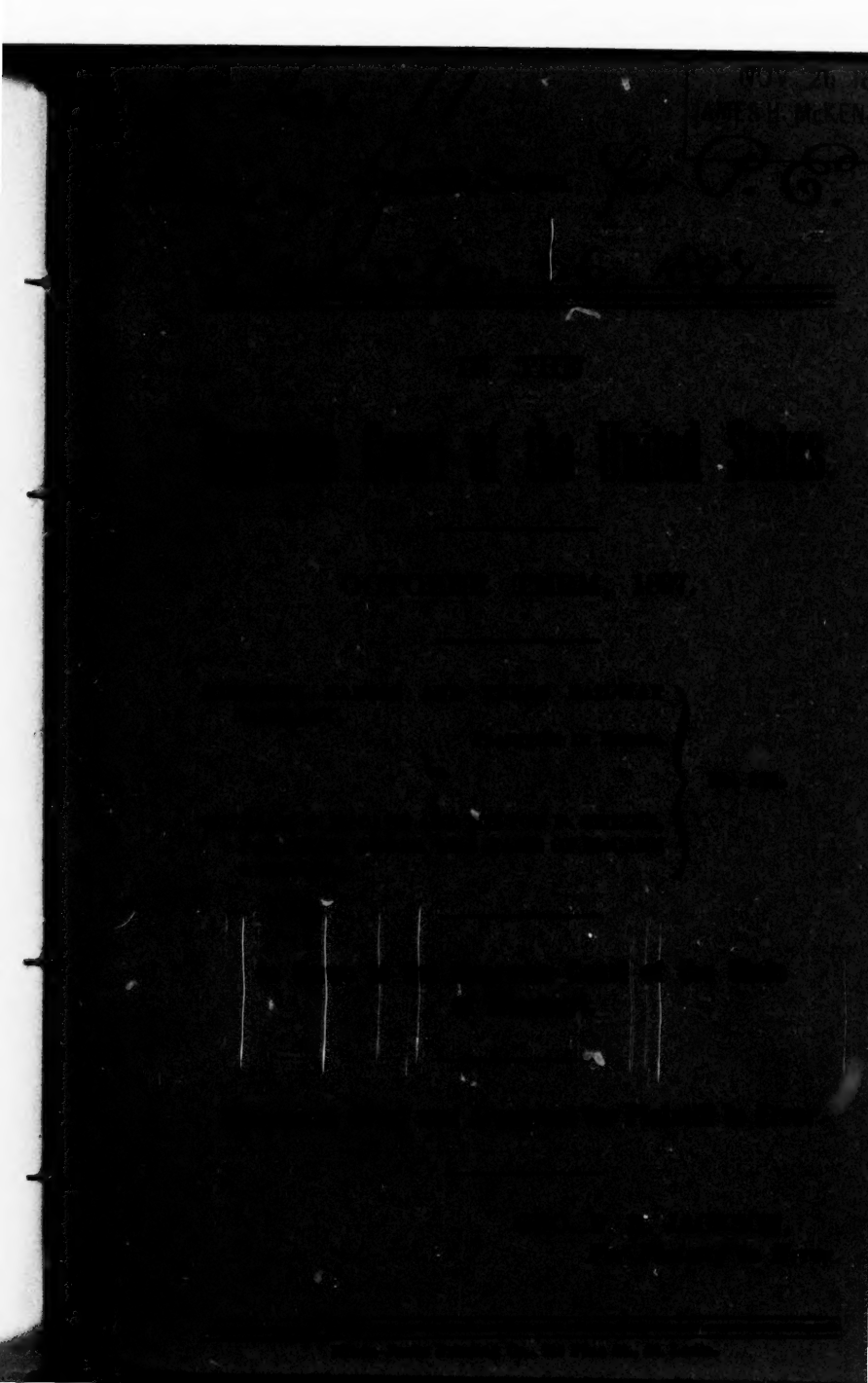

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,
PLAINTIFF IN ERROR,
vs.
WILLIAM C. McCANN AND MILTON D. SMIZER, PARTNERS UNDER THE NAME OF McCANN & SMIZER.
No. 161.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT.

This is an action commenced in the Circuit Court of Monroe County, Missouri, by McCann & Smizer, as plaintiffs, against George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas & Texas Railway, to recover dam-

ages sustained on account of delay in the shipment of ninety-nine head of cattle in November, 1890, from Stoutsville, Missouri, to Union Stock Yards, in the city of Chicago, Illinois, the petition alleging that the delay occurred at or near the city of Chicago (Rec., pp. 5–8).

The receivers answered admitting the receipt of the cattle at Stoutsville, but alleging that the Missouri, Kansas & Texas Railway terminated at Hannibal, in the State of Missouri, and that from that point the cattle were shipped over the Wabash Railroad to Chicago at the direction of the plaintiffs, now defendants in error, and that the shipment was made under a special contract, which provided, among other things, that the liability of the receivers should only be that of forwarders, and not of carriers, beyond the terminus of the Missouri, Kansas & Texas Railway; that they should not be liable for anything except the negligence of their own employees, nor for any loss or damage that occurred on any other railroad or after the cattle had left their road, and that they were not to be liable for anything beyond the line of the Missouri, Kansas & Texas Railway except to protect the through rate of freight named in the contract. The answer farther alleged that the cattle were transported from Stoutsville to Hannibal, the terminus of the Missouri, Kansas & Texas Railway, with great promptness and expedition, and without any delay, and that whatever delay there may have been in the delivery of the cattle at Chicago, occurred after they had left the Missouri, Kansas & Texas Railway, and the receivers were not liable therefor (Rec., pp. 8–10).

To this answer there was a reply which denied that the plaintiffs (McCann & Smizer) executed the contract set up in the answer, and farther pleaded "that said alleged contract, if any, was wholly without any consideration, and void, and contrary to public policy." (Rec., p. 10.)

There was a trial before a jury, which resulted in a verdict and judgment for plaintiffs for the amount sued for (Rec., p. 10).

The evidence introduced upon the trial established that there was no delay while the cattle were being transported over the Missouri, Kansas & Texas Railway, nor while they were in the custody of the defendants, receivers of that road; that the entire delay occurred after the cattle had been transferred to the Wabash Railroad at Hannibal, which was the line selected by the shipper (Rec., p. 21), and principally after they had reached the limits of the city of Chicago.

The written contract of shipment was introduced in evidence (Rec., pp. 25–29).

The parts material to this controversy are the opening paragraph on page 26 of the printed record as follows:—

> "This agreement, made between George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas Railway, parties of the first part, and M. B. Smizer, party of the second part, witnesseth: That, whereas, the receivers of the Missouri, Kansas and Texas Railway transport live stock as per above rules and regulations, and which are hereby made a part of this contract, by mutual agreement between the parties hereto; now, therefore, for the consideration and mutual covenants and conditions herein contained, said party of the first part is to transport for the second party the live stock described below, and the parties in charge thereof, *as hereinafter provided*, namely: six cars said to contain 95 head of cattle m. or l. o. r. from Stoutsville Station, Missouri, to Chicago, Illinois, station, consigned to Brown Bros. & Smith, care Union Stock Yards at Chicago, Illinois, at the through rate of 17½c. per hundred pounds, from

Stoutsville, Missouri, to Chicago, Illinois, subject to minimum weights applying to cars of various lengths as per tariff rules in effect on the day of shipment, the same being a special rate, lower than the regular rates, or at a rate mutually agreed upon between the parties, for and in consideration of which said second party hereby covenants and agrees as follows:"

The fourth paragraph on page 27 of the printed record as follows:—

"4th. That the said second party for the consideration aforesaid, hereby assumes, and releases said first party from risk of injury or loss which may be sustained by reason of any delay in the transportation of said stock caused by any mob, strike, threatened or actual violence to person or property, from any source; failure of machinery or cars, injury to track or yards, storms, floods, escape or robbery of any stock, overloading cars, fright of animals, or crowding one upon another or any and all other causes except the negligence of said first party, and said negligence not to be assumed, but to be proved by the said party of the second part."

And the thirteenth paragraph on page 29 of the printed record as follows: —

"13th. And it is further stipulated and agreed between the parties hereto, that in case the live stock mentioned herein is to be transported over the roads or road of any other railroad company, the said party of the first part shall be released from liability of every kind after said live stock shall have left its

road, and the party of the second part hereby so expressly stipulates and agrees, the understanding of both parties hereto being that the party of the first part shall not be held or deemed liable for anything beyond the line of the Missouri, Kansas and Texas Railway, excepting to protect the through rate of freight named herein."

At the conclusion of the evidence the defendants, receivers, sought to have the jury instructed to the effect that under the evidence the defendants were not liable, and farther that under the contract of shipment read in evidence the defendants were not liable for any damages or delays which occurred on any line of railroad other than the one operated by the defendants, and that if the jury found from the evidence that the defendants transported the plaintiff's cattle from Stoutsville to Hannibal without unreasonable delay, and delivered the cattle to the Wabash Railroad as its connecting carrier within the time usually and reasonably required for such transportation and delivery, then the defendants were not liable in this case notwithstanding the cattle may have been unreasonably delayed on the Wabash Railroad. These instructions were refused by the court (Rec., p. 57).

Plaintiffs asked no instructions, but the court of its own motion instructed the jury to the effect that the defendants were liable for any delays that were occasioned by the Wabash Railroad, or which occurred after the cattle were delivered to that company (Rec., p. 57).

The jury having rendered a verdict against the receivers, they filed a motion for new trial, assigning the errors committed in the giving and refusing of the instructions, and also assigning as error that the verdict and judgment, and the law as declared by the court in the instructions given were contrary to, and in conflict with, the constitution of

the State of Missouri and the constitution of the United States, " and farther that Sec. 944 of the Revised Statutes of Missouri, relied upon by the court, and by the court construed as applying to and controlling the contract of shipment under which plaintiffs' cattle were shipped from Stoutsville, Missouri, to Chicago, Illinois, is contrary to, and in conflict with, the constitution of the State of Missouri and the constitution of the United States."

This motion for new trial was overruled and exceptions saved, and a proper bill of exceptions in due time filed in accordance with the State practice (Rec., pp. 59–61).

The statute referred to in the motion for new trial, and which was relied upon to defeat the provisions of the written contract, and to render the defendant liable for delays occurring after the cattle had been delivered to its connecting carrier, is as follows: —

REVISED STATUTES OF MISSOURI, 1889.

"Sec. 944. *Liabilities of Common Carriers.*—Whenever any property is received by a common carrier to be transferred from one place to another, *within or without this State*, or when a railroad or other transportation company issues receipts or bills of lading in this State, the common carrier, railroad or transportation company issuing such bill of lading shall be liable for any loss, damage or injury to such property caused by its negligence or the negligence of any other common carrier, railroad or transportation company to which such property may be delivered, or over whose line such property may pass; and the common carrier, railroad or transportation company issuing any such receipt or bill of lading shall be entitled to recover, in a proper action, the amount of any loss, damage or injury it may be required to pay to the

owner of such property, from the common carrier, railroad or transportation company, through whose negligence the loss, damage or injury may be sustained."

In due time an appeal was prosecuted to the Supreme Court of the State of Missouri, which is composed of two divisions. This case was assigned to Division No. 2, where it was duly submitted at the April Term, 1894. On June 20th, 1894, that division decided the case, reversing the judgment of the court below, and filed an opinion in which all the judges of that division concurred, holding the above statute (Sec. 944), to be unconstitutional for the reason that it conflicted with the constitution of the United States, because plainly a regulation of interstate commerce (Rec., pp. 68–71.)

This opinion should be specially noticed here, because it was wholly ignored in the subsequent proceeding in the Supreme Court. On July 10th, following, the plaintiffs, respondents in the State Supreme Court, and defendants in error here, filed a motion for rehearing (Rec., pp. 72 and 73).

And subsequently, on October 15th, 1894, the court denied the motion for rehearing (Rec., p. 79).

Between the time of the first decision and the overruling of the motion for rehearing Messrs. Eddy and Cross, the receivers, had both died, of which fact the court was in ignorance at the time it denied the motion for rehearing, and the railroad and appurtenant property having been restored to the possession of the Missouri, Kansas & Texas Railway Company under orders of the proper United States Circuit Courts, upon the condition that the railway company should respond in all cases where the receivers were liable, the order overruling the motion for rehearing was set aside and the case was by stipulation revived in the

name of the Missouri, Kansas & Texas Railway Company, which was substituted as the appellant in the Supreme Court of Missouri (Rec., p. 79).

In December following a rehearing was granted, and the case set down for farther rehearing in January, 1895, when it was again argued and submitted in Division No. 2 of the Supreme Court of Missouri. Without rendering any farther decision or opinion in the case, that branch of the court, on July 12th, 1895, ordered the case transferred to the court *in banc*, that being the highest tribunal in the State. At the October Term, 1895, the case was argued and submitted to the court *in banc*, and on December 10th, 1895, a decision was rendered and an opinion filed affirming the judgment of the State Circuit Court. This opinion wholly ignored the previous opinion of Division No. 2, and decided that the contract between the parties must be construed under the effect of the statute, Sec. 944 above quoted, and that by reason of the effect of that statute, the defendant railway company was liable for any delays occasioned by the Wabash Company after the cattle had been delivered to it, and expressly decided that the statute referred to was not in conflict with the constitution of the United States (Rec., pp. 81–86).

The railway company, the present plaintiff in error, filed a motion for rehearing in the Supreme Court of Missouri, which was afterwards denied (Rec., pp. 87–89), and now brings the case here by writ of error, and assigns for error:—

I.

The Superme Court of the State of Missouri erred in holding and deciding that Sec. 944 of the Revised Statutes of the State of Missouri of 1889 is not repugnant to the constitution of the United States.

II.

That said Sec. 944 of the Revised Statutes of the State of Missouri of 1889 is repugnant to, and in conflict with the constitution of the United States for the reason that it attempts to, and if enforced according to its terms and purposes, does regulate commerce between the different States.

III.

The Supreme Court of the State of Missouri erred in holding that, under the effect of said statute the plaintiff in error was liable in this case for the negligence of another carrier in the State of Illinois upon a shipment from a point upon the road of the plaintiff in error in the State of Missouri to a point upon another line of railroad in the State of Illinois.

GEO. P. B. JACKSON,
For Plaintiff in Error.

POINTS AND AUTHORITIES.

I.

In the absence of the statute under consideration, R. S. of Mo. 1889, Section 944, what has been designated as the "American Rule," was in force in the State of Missouri, and under that the carrier, plaintiff in error here, was only to be regarded as a "forwarder" beyond its own line, and not liable for delays which occurred upon a subsequent connecting line, in the absence of a special contract assuming the duties and liabilities of a common carrier beyond its own line. Such was the law as declared by this court, and in most of the States, especially in Missouri.

R. R. *v.* Mfg. Co., 16 Wall. 318–324;
R. R. *v.* Pratt, 22 Wall. 123;
Ins. Co. *v.* R. R., 104 U. S. 146;
Myrick *v.* R. R., 107 U. S. 102;
Coates *v.* Express Co., 45 Mo. 238;
Snider *v.* Express Co., 63 Mo. 376;
Sewing Machine Co. *v.* R. R., 70, Mo. 672;
Dimmitt *v.* R. R., 103 Mo. 433.

See also the opinions filed in this case by the Supreme Court of Missouri.

II.

In order to extend the liability of a carrier beyond its own line it is, barring this statute, necessary to prove a special contract to that effect.

Ray's Negligence of Imposed Duties; Freight Carriers, page 364, and cases cited above.

In the case at bar there was not only no special contract for the extended liability, but a positive and express stipulation that it should not exist.

III.

In the absence of the statute in question, the carrier could lawfully contract against liability for loss or damage occurring on a connecting line or occasioned by the negligence of a connecting carrier.

Cases cited above, and

Hunter *v.* R. R., 42 Am. and Eng. R. R. Cases, 501;
Cent. Trust Co. *v.* R. R., 31 Am. and Eng. R. R. Cases, 103;
Piedmont Mnfg. Co. *v.* R. R., 19 South Car. 353;
Hutchinson on Carriers, Sec. 149b and notes.

Beyond its own line a railroad company is not a common carrier in the strict sense of the term, but is a private carrier for hire,— that is but a bailee for hire, and as such may contract against its own negligence and certainly against that of any other party.

Hutchinson on Carriers, Sec. 40;
Story on Bailments, Secs. 33 and 495;
2 Story on Cont., Sec. 752a and note;
Fish *v.* Ross, 2 Kelley (Geo.) 349;
Griswold *v.* R. R., 90 Iowa, 265;
Stevens *v.* Ry., 109 Cal. 86;
Hartford Ins. Co. *v.* Ry., 70 Fed. 201.

IV.

The entire contract must be construed together; — and so construed it is evident that the parties agreed by the

stipulations of the contract to limit the carrier's liability to its own line.

See first opinion in this case at page 70 of the record.

V.

If a special consideration for the agreement limiting the liability of the carrier is necessary, it can be found in the special rate charged for the shipment. The statement in the contract that the rate was a special one is *prima facie* evidence of that fact, and that the same rate is given to everyone under the same circumstances does not prevent its being a reduced or special rate.

McFadden *v.* R. R., 92 Mo. 343;
Rogan *v.* R. R., 51 Mo. Ap. 665;
Duvenick *v.* R. R., 57 Mo. Ap. 550.

But, as the carrier was not compelled to transport the cattle beyond its own line, no special consideration was necessary to support the clause limiting the liability. That was simply a statement of the nature and extent of the only agreement made concerning transportation beyond the initial line.

VI.

Prior to the last opinion of the Supreme Court of Missouri, in this case the statute in question had received a construction which only gave it the effect of making an unlimited bill of lading *prima facie* evidence of a special contract assuming the duties of a common carrier to the destination of another line,— but still recognizing the right to limit the liability to the carrier's own road.

Dimmitt *v.* R. R., 103 Mo. 433;

Nines *v.* R. R., 107 Mo. 475;
Glass Co. *v.* R. R., 44 Mo. Ap. 416;
Pub. Co. *v.* R. R., 44 Mo. Ap. 421;
Hill *v.* R. R., 46 Mo. Ap. 519.
Original opinion in this case, record, p. 70.

VII.

By the last opinion in this case (record, p. 82), the Supreme Court of Missouri has overturned all the rules previously mentioned, by placing a construction on the statute which forbids the limiting of liability in the manner of the contract in question, and which makes the initial carrier liable for the acts or neglect of a subsequent carrier, regardless of the stipulation to the contrary.

VIII.

The statute as now construed is a regulation of commerce, and as the statute by its terms applies to shipments to points "within or without this State" (Missouri), and in the case at bar is made to control the shipment from a point in Missouri to a point in Illinois,— it is a regulation of commerce among the States.

Hall *v.* DeCuir, 95 U. S. 485;
Leisy *v.* Hardin, 135 U. S. 100;
R. R. *v.* Illinois, 118 U. S. 571;
R. R. *v.* Illinois, 163 U. S. 142.

To the same effect have been the decisions in Missouri.

Stanley *v.* R. R., 100 Mo. 435;
Grimes *v.* Eddy, 126 Mo. 168;
Selvege *v.* R. R., 135 Mo. 163, and see original opinion in this case, and cases there cited (record, p. 71).

Because it is a regulation of interstate commerce the statute in question,— section 944, of the Revised Statutes of Missouri 1889, — is in conflict with section 8 of article 1 of the constitution of the United States, and is therefore void.

Cases cited above.

GEO. P. B. JACKSON,
For Plaintiff in Error.

ARGUMENT.

This case is brought to this court upon a writ of error to the Supreme Court of the State of Missouri for the purpose of reviewing a decision of the latter court sustaining the validity of a law of that State, which was attacked as being in violation of that clause of Sec. 8 of Article I of the constitution of the United States, which confers upon Congress the power to regulate commerce among the several States.

The law of the State of Missouri thus brought under criticism is an enactment concerning common carriers found in the Revised Statutes of Missouri, 1889, Chap. 26, Sec. 944, which reads as follows: —

> "Sec. 944. *Liabilities of Common Carriers.*— Whenever any property is received by a common carrier to be transferred from one place to another, *within or without this State*, or when a railroad or other transportation company issues receipts or bills of lading in this State, the common carrier, railroad or transportation company issuing such bill of lading shall be liable for any loss, damage or injury to such property, caused by its negligence or the negligence of any other common carrier, railroad or transportation company to which such property may be delivered, or over whose line such property may pass; and the common carrier, railroad or transportation company issuing any such receipt or bill of lading shall be entitled to recover, in a proper action, the amount of any loss, damage or injury it may be required to pay to the owner of such property, from the common

carrier, railroad or transportation company, through whose negligence the loss, damage or injury may be sustained."

The question arose in this case in the following manner: The original defendants, Messrs. Eddy and Cross, were the receivers of the Missouri, Kansas & Texas Railway, a line extending through the State of Missouri, and having its northern terminus at Hannibal, Missouri, on the Mississippi river. The plaintiffs, a partnership under the name of McCann & Smizer, shipped a lot of cattle from Stoutsville, a station on the Missouri, Kansas & Texas Railway, in Missouri, consigned to a commission firm at the Union Stock Yards in the city of Chicago, Illinois. The cattle could only be transported a short distance over the defendant's road, that is from Stoutsville to Hannibal, where they had to be transferred to some other line to be carried to Chicago. The shippers (defendants in error here) selected the Wabash Railroad as the connecting line to which the Missouri, Kansas & Texas road was to deliver the cattle at Hannibal for transportation to Chicago. It was conceded at the trial that there was no delay on the Missouri, Kansas & Texas Railway, and that the delay which caused the loss of which complaint was made all occurred on the Wabash Railroad while the cattle were in its custody. It is not necessary to refer to the evidence of one of the original plaintiffs by whom this was shown. It is sufficient that in both opinions filed by the Supreme Court of the State this question was taken as settled.

In the first opinion, at page 68, the court said:—

"Action to recover damages based on delay in the shipment of a lot of cattle from Stoutsville, in Monroe County, Missouri, to Chicago, in Illinois.

"The delay complained of occurred in the latter State, and on a connecting road."

In the last opinion filed in the case (Rec., p. 82) the court makes the following statement:—

"This action is to recover damages against defendants as receivers of the Missouri, Kansas & Texas Railway for negligent duty in the transportation and delivery of 95 head of cattle from Stoutsville, in Monroe County, in this State, to Chicago, in the State of Illinois.

"Stoutsville is a station of the road operated by defendants. Hannibal is the eastern terminus of their road. From that road the Wabash Railway Company operates a road to Chicago. The cattle were delivered by defendants to the Wabash Company in a reasonable time, and in good order, by which they were carried to Chicago. The negligence complained of was committed on the Wabash road, and by its employees."

The shipment was made upon a written bill of lading, or, as it was styled, "Live Stock Contract," which was introduced in evidence upon the trial. It contained a number of provisions not material to this case. It appears at length in the record at pages 25 to 30. The parts material here are the opening paragraph and the subsequent ones marked 4 and 13, which are set forth in the statement at pages , *ante*.

In the Circuit Court, where the case was brought, plaintiffs recovered judgment for the amount sued for, and the receivers of the railway company appealed, and, because of the constitutional question involved, the appeal was taken to the Supreme Court of the State, which is composed of two divisions. Except for this constitutional

question that court would not have had jurisdiction of the appeal. The case was assigned to Division 2, where, in due time, a decision was rendered, and an opinion filed reversing the judgment of the lower court, because the statute above mentioned was unconstitutional (see Transcript of Record, pp. 68–71).

Subsequently the respondents in that court (defendants in error here) filed a motion for rehearing, which was overruled. Prior to the overruling of the motion, however, both of the receivers had died, which fact was at the time unknown to the Supreme Court of the State. In the meantime also, by orders of the proper courts, the railroad had been restored to the possession of the Missouri, Kansas & Texas Railway Company. A stipulation was filed suggesting the death of the receivers (former appellants) and providing for the substitution of the Missouri, Kansas & Texas Railway Company as defendant and appellant in place of the receivers. Thereupon the court made an order setting aside the overruling of the motion for rehearing and reviving the cause in the name of the Missouri, Kansas & Texas Railway Company. For convenience, we will treat the case as though the Missouri, Kansas & Texas Railway Company had all the time been the party upon that side. Some months later Division 2 of the Supreme Court granted a rehearing, and the case was again argued, but, without any farther decision, it was transferred to the court *in banc*, composed of the two divisions, and which is the court of last resort in the State. The case was finally decided by the court *in banc* sustaining the judgment of the lower court and holding the statute to be valid, on the ground that it was not a regulation of interstate commerce, and not in conflict with the constitution of the United States (see the last opinion, Transcript of Record, pp. 81–86).

In order to appreciate the effect of the statute of Missouri as construed and applied by the Supreme Court of

the State, it is well to inquire as to the state of the law and the rights of the parties independently of the operation of this statute.

In the absence of the statute, what has been designated as "the American rule" was in force in Missouri, and, under that, the common carrier (plaintiff in error here), was only to be regarded as a "forwarder" beyond its own line and not liable for the delays which occurred upon the Wabash Railway,— at least in the absence of any special contract by the plaintiff in error assuming the duties and liabilities of a common carrier beyond its own line. This is conclusively settled by the cases cited under Point I of the brief. In connection with that rule of law it was held that a carrier had the power to contract for carriage beyond its own line, and to impose upon itself all the duties and liabilities of a common carrier, even upon the line of another road, but such increased responsibilities and extended duties were not to arise out of mere surmises nor to be inferred from loose statements, but must be clearly established. As a corollary of these propositions the courts asserted and maintained the right of a carrier to restrict such liability to its own line, even though the bill of lading provided for transportation over a connecting line.

The subject is fully discussed in Ray's Negligence of Imposed Duties — Freight Carriers, Chap. 13, beginning at page 364, where numerous cases are cited. Among other things that author says:—

> "In the absence of a special contract a common carrier's liability for goods ends with delivery to a connecting line. * * * The rule of law is well settled in most of the courts that although a railroad corporation may contract to carry beyond its own line, yet it requires an express contract to so bind it."

"Generally a common carrier is not liable for losses sustained beyond the terminus of its own road, unless it has assumed such liability by express contract, or some arrangement in the nature of a partnership exists between it and the connecting carriers. Any imposed obligation of a carrier to the public is limited by the termini of its own route. There is no common-law liability devolving upon any carrier to transport goods over other than its own lines. The liability of a railroad company for the safe carriage of goods beyond the terminus of its own line depends upon its special contracts, express or implied; in the absence of special contract, a railroad company receiving goods for transportation beyond its own line is liable only to the extent of its own road, and for the safe storage and delivery to the next carriers."

In Myrick *v.* R. R., 107 U. S. 102, this court said: —

"A railroad company is a carrier of goods for the public, and, as such, is bound to carry safely whatever goods are intrusted to it for transportation, within the course of its business, to the end of its route, and there deposit them in a suitable place for their owners or consignees. If the road of the company connects with other roads, and goods are received for transportation beyond the termination of its own line, there is superadded to its duty as a common carrier that of a forwarder by the connecting line; that is, to deliver safely the goods to such line,— the next carrier on the route beyond. This forwarding duty arises from the obligation implied in taking the goods for the point beyond its own line. The common law imposes no greater duty than this. If more is expected from the company receiving the shipment, there must be a

special agreement for it. This is the doctrine of this court, although a different rule of liability is adopted in England and in some of the States. As was said in Railroad Company *v.* Manufacturing Company, 'It is unfortunate for the interests of commerce that there is any diversity of opinion on such a subject, especially in this country; but the rule that holds the carrier only liable to the extent of his own route, and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction.' 16 Wall. 318, 324.

"This doctrine was approved in the subsequent case of Railway Company *v.* Pratt, although the contract there was to carry through the whole route. 22 Wall. 123. Such a contract may, of course, be made with any one of different connecting lines. There is no objection in law to a contract of the kind, with its attendant liabilities. See also Insurance Company *v.* Railroad Company, 104 U. S. 146.

"The general doctrine, then, as to transportation by connecting lines, approved by this court, and also by a majority of the State courts, amounts to this: that each road, confining itself to its common-law liability, is only bound, in the absence of a special contract, to safely carry over its own route and safely deliver to the next connecting carrier, but that any one of the companies may agree that over the whole route its liability shall extend. In the absence of a special agreement to that effect, such liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language but only from clear and satisfactory evidence."

In harmony with the above, the Supreme Court of the State of Missouri, in Coates *v.* Express Co., 45 Mo. 238,

and in Snider *v.* Express Co., 63 Mo. 376, held that, although a bill of lading issued by one carrier provided for transportation over the line of another carrier yet, as to such other line, the issuing carrier was to be regarded simply as a forwarder.

In the case of Sewing Mach. Co. *v.* R. R., 70 Mo. 672, the Supreme Court of the State of Missouri said:—

> "That a railroad may, by contract, subject itself to the obligation of a common carrier beyond its own line, is well settled by the weight of authority, but as was said in R. R. *v.* Pratt, 22 Wall. 124, the result of American authorities, limits the carrier's liability as such to his own line, when no special contract is made. In Perkins *v.* P. S. & P. R. R. Co., 47 Me. 593, it was held that 'a railroad may be bound by special contract, *but not otherwise*, to transport persons or property beyond the line of its own road.' This remark was criticised in Lock Co. *v.* Railroad, 48 N. H. 355, in which we think it was shown 'that the term 'express contract' could hardly have been used in its strict sense, to signify a contract in the form of a direct promise or undertaking, in language, oral or written, proper to show a positive agreement, since the judge who delivered the opinion of the court speaks of a case where the carriers would be liable on the ground that they held themselves out as common carriers to that place; in which case (remarks the judge in the New Hampshire case), as I understand it, the contract would not be express in the strict or usual sense of the term, but implied from the conduct of the party.' Taking the criticism as just, the doctrine may be stated, that a railroad company *may be bound by contract, express or implied, but not otherwise*, to transport persons or property beyond the line of its

own road. As thus declared, it is fully sustained by the authorities, both in the United States and England.''

This was the state of the law in Missouri at the time of the enactment of the statute in question. Subsequently, the question of the validity of the statute arose in the State Supreme Court in the case of Dimmitt *v.* R. R., reported in 103 Mo. 433. There the law was attacked as being a regulation of the interstate commerce, just as it is in the case at bar. In order to avoid that effect, the court gave a certain construction to the statute which will be mentioned hereafter. As relating to the state of the law, however, the court in that case, at page 442, stated the law at the time of the enactment of the statute to be as above, and the same view was expressed in subsequent cases approving the construction given to the statute in the Dimmitt case, which cases will be found under Point VI. of the brief herein.

The same view as to the former state of the law in Missouri is clearly expressed in both the opinions filed in the case at bar, as set forth at length in the Transcript of Record.

In the first opinion in this case the court, in speaking of a former recent decision of that court, by which the statute was so construed as to save it from the charge of unconstitutionality, said :—

> "It has been ruled in Dimmitt *v.* R. R., 103 Mo. 433, under the provisions of the quoted section (then Sec. 598) that it was competent for a common carrier by specific agreement to agree to carry the property only to the terminus of its own line, or what is equivalent thereto, by similar agreement to limit its liability to loss or damage occurring on its own line. This ruling was followed in Nines *v.* R. R., 107 Mo. 475.
>
> "In a similar case, Snyder *v.* Express Co., 63 Mo.

376, before the enactment of the statute in question a similar ruling was made." (Trans. of Record, p. 70.)

In the last opinion in the case, which is now complained of, the court restricted the construction given to the statute in the Dimmitt case, as only authorizing a limitation upon liability by simply contracting to carry to the end of the particular line, and holding that the statute prohibited a limitation upon the liability when the carriage provided for extended beyond the line of the first carrier.

In comparing this position with the former state of the law, the court said, concerning the Dimmitt case:—

> "In that case it was held that that general effect of the statute, and its evident purpose was to apply to common carriers the English rule of duty and liability in respect to the carriage of property beyond their own route as distinguished from the American rule which was at the time recognized as the law of this State. * * * This ruling was in accord with the decisions of the English courts, but under the law as it existed in Missouri prior to the statute, upon the facts shown to have existed, the receiving company would not have been liable for the loss. There is no doubt the statute by its very terms has the effect of applying the English rule so far as it makes the receiving carrier responsible for the defaults of other carriers through whose agencies it undertakes to complete the contract of carriage. This is as far as the decision in the Dimmitt case goes." (Transcript of Record, p. 84.)

Then, after farther quotation from the Dimmitt case, the court proceeds in the opinion: —

> "The provision of the statute is that 'wherever

property is received by a common carrier to be transferred from one place to another.' This language does not restrict, but rather recognizes, the right of the carrier to limit its *contract of carriage* to the end of its own route, and there deliver the property to the connecting carrier.

"There can be no doubt then that under the statute, as well as under the English law, the carrier can by contract limit his duty and obligation to *carriage* over its own route.

"But it seems that under the decisions of the English courts, a carrier can also limit his liability to a loss or damages occurring on his own route by specific agreement that it should only be so liable.

"In the Dimmitt case the rule is stated to the full extent, though unnecessary to the decision in that case, there having been no attempt to make such limitation. * * * The dictum of the court in the Dimmitt case to the effect that an agreement that a carrier should only be liable for loss or damage occurring own its on line is equivalent to an express contract to carry the property only to the terminus of its own line, cannot be taken as the law of this case where there is an express contract and also an agreement for non-liability. * * * We cannot therefore give such an interpretation to the statute as would permit a carrier to contract for a through shipment and at the same time exempt himself from liability on account of the negligence of connecting carriers. Such an interpretation would, in effect, operate as a repeal of the vital provisions of the law *which declares a conclusive liability in such case.*

"The statute does not undertake to change the law in respect to liability of carrier for his own negligence, but to extend it to connecting carriers as well and

declare liability for negligence without regard to which was in fault.

Under these views of the law no difficulty is found in giving construction to the contract. The agreement to carry from Stoutsville to Chicago is absolute and unconditional. The thirteenth condition or covenant can only be regarded as an attempt on the part of the defendant to relieve itself from the responsibility of answering for the negligence of the carrier by which it undertook to complete the contract. *The statute forbids such qualification of the contract.*" (Transcript of Record, pp. 85 and 86.)

There is no difficulty therefore in reaching the conclusion that, but for the statute in question, the courts of Missouri would have held that it was competent for the plaintiff in error to have limited the liability in the manner attempted in the contract in question. The theory of the court in fixing the liability upon the defendant is plain. It is that there was a contract for through carriage which in the opinion of that court, must be regarded as unlimited by the thirteenth paragraph of the contract. In order to reach the conclusion which it did the court held that the contract for carriage from Stoutsville to Chicago was "absolute and unconditional." This interpretation of the contract could only be reached by ignoring the limitation of the thirteenth paragraph, and that was accomplished by ignoring it under the force of the statute which, as the court says, forbids such qualification, because the effect of that qualification would have been "a repeal of the vital provisions of the law which declares a conclusive liability in such case." We must not be misconstrued into attempting to put the Supreme Court of Missouri in the attitude of holding that a carrier can be compelled to accept property for transportation beyond its own line.

That it cannot, the court concedes. But the announcement is made that when property is received for transportation to a point beyond the carrier's line, then the absolute liability of a common carrier to the destination attaches, *by force of the statute*, and all attempts to limit the liability, as might formerly have been done, are rendered nugatory by operation of the statute.

Much weight has heretofore been given in this case to the contention that the attempt to limit the liability in this contract must fail because there was no sufficient consideration for it. While that is not made a prominent feature in the opinion of the court, yet it will probably be urged by counsel, as it has been heretofore. Briefly upon that question, I submit, first, that a reduced rate is a sufficient consideration for the making of any agreement which is not against public policy, and that under the law in Missouri, the recital in the contract that the rate charged is a special one is *prima facie* evidence of that fact, and that the circumstance that a similar rate is given to other shippers under like circumstances does not destroy the character of the rate as a special or a reduced one. Therefore, under the recital in this contract, there appeared to be a sufficient consideration if one was needed (92 Mo. 343; 51 Mo. App. 665; 57 Mo. App. 550).

But a second answer to this contention is that no special consideration was needed. An examination of the contract will show that there were a number of stipulations which were by their terms made to depend upon the consideration of a special rate. Among others was the fourth paragraph, which has been wholly ignored by the court below, releasing the carrier from all liability except for its own negligence. But when we come to the thirteenth paragraph, which is the most essential one in this controversy, we find that it is so constructed as to indicate an entire independence of the mere matter of special rate. It finds

its support, so far as consideration is concerned, in all the stipulations and in the mutual agreements of the parties. It rests upon the opening paragraph of the contract, which says: "Now, therefore, for the consideration and mutual covenants and conditions herein contained." This thirteenth paragraph is not to be construed as a special provision depending upon some special consideration. It is a statement of the extent of the duty and obligation assumed by the carrier. It is an expression adopted to set forth just what the agreement between the parties was. The contract in the opening paragraph provided that the carrier was to transport the live stock described "*as hereinafter provided*" from Stoutsville, Missouri, to Chicago, Illinois. Certainly the words "as hereinafter provided" referred to something else to be subsequently set forth in the contract as explaining and limiting the transportation previously mentioned. The transportation "as hereinafter provided" was, by the terms and within the limits of this contract, to be a carriage with the unconditional liability of a common carrier to the terminus of the carrier's line, and with a limitation against such liability beyond that line. As the carrier had the right to stipulate that it would carry only to the end of its line, so it had the right to say upon what conditions it would carry beyond its line, and this was all that this contract undertook to do. As there was no common law duty, and no statutory duty upon it to carry beyond its own line, it could undertake such extended transportation or not, just as it pleased, and as it had the right to refuse altogether, so it had the right to impose such limitations as the other party would agree to. Unless therefore it be said that it was against public policy, or that it was prohibited by some statute, the limitation in the thirteenth paragraph should be given full effect without regard to the question of a special consideration to support it.

The contention has also been made that a carrier cannot limit its liability beyond its own line in a contract providing for through transportation, because, to do so, would be to contract against its own negligence. Counsel for defendants in error have contended that, even regardless of the statute, such was the effect of the contract in this case. The court, however, reached the conclusion that the limitation attempted by the thirteenth paragraph became a limitation of liability against the carrier's negligence, only because the statute made the carrier liable for the negligence of the connecting line. The proposition involved as the basis of both of these conclusions, whether depending upon the statute or not, is that there was an "absolute and unconditional" contract for through carriage, and that that having been made, no limitation could be placed upon it. According to the method of reasoning heretofore adopted by counsel upon the other side, there was a complete contract in the first paragraph for carriage from Stoutsville, Missouri, to Chicago, Illinois. Of course there is no contention that the plaintiff in error could not have made such a special contract, and if there had been no limitation or qualification, it would have been subject to all the liabilities of a common carrier throughout the entire distance. It is well settled, however, that, in order to impose upon the initial line the liability of a common carrier beyond the terminus of its own road, there must be a special contract either express or implied to that effect.

This was distinctly announced as the rule in Missouri in the case of Sewing Machine Co. *v.* R. R., 70 Mo. 672, where it is said: —

> "The doctrine may be stated that a railroad company may be bound by contract, express or implied,

but not otherwise, to transport persons or property beyond the line of its own road."

Since there must be this special contract, it may be made upon such terms and conditions as the parties agree upon, and that is to be ascertained, not from reading a single paragraph of the contract between the parties, but by taking the whole of it and construing all its parts together. When we read the contract here in question we find that the first stipulation was that, for a rate of freight specified, the plaintiff in error, whose railroad terminated at Hannibal on the State line of Missouri, contracted to carry the cattle in question from Stoutsville, Mo., to Chicago, Illinois, "as hereinafter provided." Even without the use of these words just quoted, this opening paragraph must be considered in connection with what follows, but, when it is specifically stated that this extended transportation was to be performed in the manner subsequently specified in the contract, attention is specially directed to the future stipulations. In the fourth paragraph it is provided that there is a release from liability from everything except the negligence of the party of the first part, that is the plaintiff in error, and then farther in the thirteenth paragraph the nature of the undertaking of the plaintiff in error is particularly set forth, and it is to the effect that it is not to be responsible for any loss or damage occurring beyond its own line. It cannot be said that there was a complete contract for through transportation which imposed the duties and liabilities of a common carrier, and that by some subsequent independent contract an effort was made to limit the liabilities assumed by the former one, because there was no contract for carriage at all until the agreement was made that there should be no liability beyond the initial line. It manifestly was not the intention of the parties to make such a

contract as imposed upon the initial carrier liability throughout the entire distance. At the same time that the parties signed the stipulation for transportation from Stoutsville to Chicago they signed the other stipulation limiting the liability to the initial line. When they executed one part of the contract they executed every part, and all became effective at the same instant. Hence, there was no " absolute and unconditional " contract for through carriage, either in the intention of the parties or in the form of the instrument adopted to express that intention. Any effort to so construe the contract independently of the statute in question must fail. In fact the Supreme Court of Missouri, in its last opinion, repudiated such a construction of the contract, but reached its conclusion solely by reason of the construction which it puts upon the statute.

In this last opinion the court says :—

> " We cannot, therefore, give such an interpretation to the statute as would permit a carrier to contract for a through shipment, and at the same time exempt himself from liability on account of the negligence of connecting carriers. Such an interpretation would in effect operate as a repeal of the vital provisions of the law, which declares a conclusive liability in such case. The statute does not undertake to change the law in respect to liability of a carrier for his own negligence, but to extend it to connecting carriers as well, and declare a liability for negligence without regard to which was in fault. Under these views of the law, no difficulty is found in giving construction to the contract. The agreement to carry from Stoutsville to Chicago is absolute and unconditional. The thirteenth condition or covenant can only be regarded as an attempt on the part of the defendant to relieve itself

from the responsibility of answering for the negligence of the carrier by which it undertook to complete the contract. *The statute forbids such qualification of the contract.*"

Thus it is that the statute is so construed as to render the contract for through carriage absolute and unconditional, and to nullify the attempt to limit the liability.

If it were not as the court said, that "the statute forbids such qualification of the contract," there can be no reasonable question but that the carrier might limit its liability by such a stipulation as that contained in the thirteenth paragraph.

It has been suggested that such a stipulation following a previous stipulation for through transportation is against public policy.

And the court possibly had some such idea in connection with the effect of the statute, for it is said:—

> "The statute does not undertake to change the law in respect to liability of a carrier for his own negligence, but to extend it to connecting carriers as well, and to declare a liability for negligence without regard to which was in fault."

This proposition, however, that the limitation upon the liability is against public policy, must be regarded with reference to the difference between the duty of a common carrier to transport over its own line and over the line of another carrier.

In the first case, it acts under the compulsion of the general law which compels a carrier to receive, transport and safely deliver the goods tendered to it. In the latter case, there is no such law governing its actions. It is as free to contract in regard to transportation over some other

line as any individual is to contract in regard to his personal services or concerning his individual property. The very reason which is given why a carrier cannot contract against its own negligence is that the law imposes upon it a duty to the public. Therefore it cannot by contract remove these obligations. The character of a common carrier the law stamps upon it and it cannot change it or abandon it by any contract it may enter into. As is aptly stated in the syllabus to Railroad *v.* Lockwood, 22 Wallace, 328:—

> "A common carrier does not drop his character as such merely by entering into a contract for limiting his responsibility."

Even if it made a contract that it would not be liable for its own negligence, it does not cease to be a common carrier. Therefore, the law continues to hold it responsible for its negligence despite its contract. When, however, we pass from its own line, we are confronted with different conditions; we are no longer dealing with a party resting under onerous duties imposed by the law. It is freed from these severe obligations and heavy penalties,—so onerous and severe that the courts have all said that the law does not impose them upon a carrier beyond its own line. Therefore, all the liabilities that can be claimed to exist against a party by reason of a proposed carriage beyond its own line are such and such only as it agrees to assume. It may assume them if it will, but if it does so it is the result of a special contract.

In the opinion originally filed in this case is the following language:—

> "In the case at bar, the instrument which is the basis of this action is to be construed as a whole.

> Construing it in this way, it is easy to see that the liability apparently assumed by the first clause of the contract is expressly qualified and limited by the thirteenth specific agreement aforesaid, which in clear and unambiguous terms confines the liability of the defendant company to its own line of road."

The statement there made is in harmony with the almost uniform expressions of the courts and is a more logical view of the case than that taken in the last opinion.

Among many cases to the same effect I cite the following:—

> Hunter *v.* Ry., 42 Am. & Eng. Ry. Cases, 502;
> Cent. Trust Co. *v.* R. R., 31 Am. & Eng. Ry. Cases, 103;
> Piedmont Mnfg. Co. *v.* R. R., 16 Am. & Eng. Ry. Cases, 194 (19 South Car. 353);
> Hutchinson on Carriers, Chap. V. generally, and specially section 149b, and notes.

The case of Piedmont Mfg. Co. *v.* Railroad, *supra*, contains an exhaustive discussion of the question under consideration, with a result directly opposed to that announced in the last opinion in this case. There the court construed the contract of shipment in question to be one for a through shipment in one clause, as may be said of the one now under consideration, but by reason of a clause limiting the liability to the carrier's own line, the court held that the issuing carrier could not be held on account of the negligence of a connecting carrier through whom the transportation was to be completed. I especially ask the attention of the court to the reasoning of this case and to the distinction that is drawn between the duties and liabilities of a com-

mon carrier upon its own line arising from public law, and the liability of the same carrier on account of negligence occurring upon a connecting line, which would arise entirely out of contract. Unless the reasoning of that case can be overthrown, it is decisive of the case at bar, for the analogy could not be stronger.

Mr. Hutchinson, in his work on Carriers, at section 149b, uses this language:—

> "The liability of the carrier beyond the terminus of his own route being thus a matter of contract, it is clear that he may prevent all question as to his liability by an express contract excluding it, and that such a contract will be enforced even in those States where the rule of Muschamp's case prevails. Such a contract is not opposed to public policy nor void as an effort to relieve the carrier of his common law liability for negligence. Limitations of this nature are found in nearly all of the modern contracts of carriers, and will prevail under the same circumstances that any other contract would be enforced."

See also Ray's Negligence of Imposed Duties, Freight Carriers, Chap. XIII.

The fact that the transportation beyond the carrier's own line does not result from the operation of any general rule of public law, the fact that he is not required against his will to undertake the transportation beyond his line shows that he is not a common carrier in the strict sense of the term. The test that is laid down to distinguish between a common carrier and a private carrier for hire is that the latter may undertake the transportation or not as he desires. This is the privilege of a carrier beyond his own line and establishes his relation to such a transaction as

that of a private carrier for hire. The private carrier for hire is but a bailee for hire and as such is only liable for negligence; that is, for failing to exercise that degree of diligence which is required of him. If he is not negligent he cannot be liable, and yet it is well settled that the bailee for hire may contract against such liability even to the extent of removing it entirely.

Hutchinson on Carriers, Section 40;
Story on Bailments, Sections 33 and 495;
2d Story on Contracts, Sec. 752a, and note, and especially the case of Fish *v.* Ross, fully abstracted therein.

These authorities are consistent with our general understanding upon such questions. It is not correct to say that in no case can a party contract against his negligence. It is only where to do so would change or abandon the character which some particular vocation gives to him under the general law. If a duty is imposed upon a party by public law to do a certain thing in a certain way, then it is against the policy of the law to permit him to so contract as to avoid that duty, but where an obligation may be assumed or not as the party elects, and if assumed at all is done by a special contract, there the party may put a limitation upon his liability. By doing so, he does not attempt to countervail the policy of any public law. As illustrations see: —

Griswold *v.* Railroad Company (Iowa), 57 N. W. 843;
Stevens *v.* Ry. (California), 41 Pac. 787;
Hartford Ins. Co. *v.* Ry., 70th Federal, 201.

In all of these cases, it is held that a railway company in leasing a portion of its right of way may contract against its liability for damage arising from the destruction of buildings occasioned by its own negligence. The reasoning

of these cases makes them especially applicable to the matter we have in hand. In the last case, Judge Sanborn, after having referred to various cases which held that a railway company cannot contract against liability for its negligence in operating its road, and after pointing out the analogy in many respects between such cases and the one under consideration, adds:—

> "But the analogy fails in that vital part which constitutes the reason and foundation of the rule established by the authorities cited. Its fallacy is, that the law imposes upon a railroad company the absolute duty to operate its railroad, to employ suitable men to operate it, to exercise ordinary care to furnish them with a reasonably safe place in which to render their services, and with reasonably safe appliances and machinery with which to perform them. Any breach of this duty is a violation of the law which imposes the duty. It is also an immeasurable injury to the public interests, because it endangers the lives and limbs of citizens, which are of the highest value to the State and nation. A contract which exempts the carrier from negligence in the discharge of these duties is void because it relieves it of an absolute duty which the law imposes upon it and because it unreasonably endangers the lives of employees and passengers. But the law imposes no duty upon a railroad company to lease its right of way or to use ordinary care not to set out fires that would burn property placed upon it by strangers without permission. In the former case public policy and the law imposed upon the carrier the duty to hire employees to operate its railroad with reasonable care in order to protect its employees from injury and therefore it may not contract to be relieved from the law and the duty.

The carrier has no choice. It must perform these duties or forfeit its charter. In the latter case no duty to lease is imposed. The company has the option,— the choice,— to lease or refuse to lease; and if it does lease and does stipulate for indemnity from damages caused by its negligence in firing the property of the lessee placed upon the leased premises by its permission that contract in no way relieves it from the discharge of any duty to the public or to any citizen that the law or public policy had imposed upon it.

"Again, the law imposes upon a railroad company the absolute duty to accept passengers and freight when offered and to carry the former with the utmost and the latter with ordinary care. The passenger is often obliged to travel and the shipper to send his goods by railroad. In making their contracts, they do not stand on an equal footing with it. They cannot stop to negotiate and decide upon the terms of a contract every time they desire to use the railroad. They would often prefer the abandonment of the contract to such negotiations. On the other hand the railroad company with its trained employees and its monopoly of the transportation facilities sought has the ability and the power to exact the contract it desires. This inequality in the situation of the parties which would, if permitted, enable the railroad company to obtain unfair contracts from shippers, and the fact that contracts with them which exempt the company from liability for negligence relieve it from an absolute duty imposed by the law, and thus violate it, and at the same time increase the danger to the lives and the property of the people from the operation of a railroad, constitute the reasons for the decisions that have established and maintained the rule that such contracts are against public policy."

In the case at bar it is just as correct to say that the defendant had an option concerning the carriage beyond its line as it was to say, in the case last cited, that the company had an option concerning the lease. As it there had the choice to lease or refuse to lease, so in the case at bar the defendant had the right to transport or to refuse to transport beyond its own line. The law imposes no more obligation to do a particular thing in one case than it did in the other. It was no more the result of the policy of the law concerning the defendant's duty upon its own line that it should enter into a contract to carry beyond that line, than it was that it should make a lease of a part of its right of way. Without protracting this discussion farther, I rest in confidence that the court must agree that the carrier had the right to insert in the contract, seemingly providing at the outset for through importation, the clause limiting liability to loss or damage on its own line, and that, as was said in the Dimmitt case, to have done so was equivalent to having limited the carriage to its own line. Or, what is perhaps the more correct statement of the proposition, that notwithstanding the language calling for transportation from Stoutsville to Chicago, the subsequent stipulation limiting the liability to loss or damage upon the carrier's own line prevented the contract being construed as one for a through shipment and precluded the construction from which it might be said that the Wabash Railway was the agent of the initial carrier for the purpose of completing the transportation. This must be the result unless the statute accomplishes a different result. That it has that effect is really what the court has decided in this case, although it is done with a manifest desire to avoid a repudiation of the Dimmitt case.

The only thing that the liability of the plaintiff in error for the delay on the Wabash Railroad can stand upon is that

such is the effect of the statute, and upon that ground alone the State court was in the end forced to stand.

Such construction of the statute had been acquiesced in for some time (46 Mo. Ap. 521), until it was attacked as being unconstitutional in the Dimmitt case, 103 Mo. 433. To save the law from that attack the court then held that the statute only made the receiving for through carriage *prima facie* evidence of a contract therefor, but that the carrier might still restrict its liability by a stipulation for carriage only to the end of its line, or by limiting the liability to its own line, as was done in the case at bar.

That construction of the statute was followed in a number of cases (see Point VI of the brief), and was regarded as the law of Missouri until the last opinion in the case at bar.

That opinion completely overthrows the reasoning in the Dimmitt and subsequent cases, and renders meaningless the reasons which were given to sustain the constitutionality of the law.

It will be noted that the language of the statute is not that the receiving carrier shall be converted into and regarded as a common carrier throughout the entire distance, but simply that it shall be liable for the negligence of the connecting carrier. The very terms of the statute contemplate the agencies of two distinct carriers, but renders the first liable for the negligence of the succeeding one. When this statute was attacked because it arbitrarily imposed burdens upon carriers, the Missouri Supreme Court said in the Dimmitt case, that it was not the intention of the statute to do that, but only to change the rule of evidence, as it theretofore existed in that State and generally in the other States, by adopting the English rule as to the evidential effect of certain things.

In that case the court said:—

"It is suggested in the brief of counsel for appel-

lant that this statute is violative of some constitutional provisions, under a construction which would render the defendant liable in this case. In order to determine whether it is obnoxious to any constitutional inhibitions, State or national, it becomes necessary first to ascertain its true scope and meaning. At the time of its enactment, the law was as well settled as now that a common carrier may *contract* to carry to a place beyond the terminus of his route and thereby render himself liable as such for the whole distance, but that he is not *required* by law to transport beyond his own line, and, therefore, may stipulate that he shall not be liable except for such loss or damage as may occur on his own route.

"While there was a universal consensus of opinion upon these propositions, there was a diversity of opinion as to what should be evidence of a contract for through carriage when no special contract was made; the English and the courts of some of the States holding that 'where a common carrier takes into his care a parcel directed to a particular place and does not, by positive agreement, limit his responsibility to a part only of the distance, it is *prima facie* evidence of an undertaking on his part to carry that parcel to the place to which it is directed,' although such place was beyond the terminus of his own route."

The law before the adoption of this statute, as well as now, as I have already shown, was that the carrier could only become liable for transportation and its consequences beyond its own line by making a special contract to that effect. The effect of the Dimmitt case is that entering into a contract upon the subject of transportation beyond its own line without limitation upon the liability is made *prima facie* evidence of such special contract as makes the party

a carrier throughout the entire distance. This whole subject is really to be regarded with reference to the effect of this *prima facie* evidence, unless we entirely repudiate the construction given to this statute in the Dimmitt and other cases.

When we find that the statute does not dealwith the question of limiting liability, and does not attempt to prohibit it, but simply in its terms imposes upon the first carrier, liability for the negligence of other carriers, and when we find that the Missouri court construes the language of the statute to mean that the act of a carrier in receiving goods to be transported to a place beyond its own terminus is *prima facie* evidence of an undertaking on its part to carry to the destination, and that such contract as that of which we thus have *prima facie* evidence must be a special one, and that the duties and obligations of a carrier can not otherwise be imposed beyond the carrier's own line, then all we have to inquire farther is whether or not there is any fact overcoming this *prima facie* evidence. As the court said farther in the Dimmitt case,—

> "This *prima facie* case the statute makes for the plaintiff on the facts stated. In order to defeat it, the defendant must show that by specific agreement it only contracted to carry the property to the terminus of its own line, *or, what is equivalent, that there was a specific agreement that it was to be liable only for loss or damage occurring on its own line.*"

This qualification is repudiated in the last opinion in the case at bar, as being mere dictum. Now the court holds that there can be no limitation of the liability to the loss occurring on the carrier's own line because, "the statute forbids such qualification of the contract," and because "such an interpretation would in effect, operate as a

repeal of the vital provisions of the law which declares a conclusive liability in such case."

Because of this new construction of the statute, not only does the *prima facie* evidence of an undertaking for through carriage arise where a parcel is received directed to a particular place, as held in the Dimmitt case, but the statute goes farther and "declares conclusive liability in such case," and forbids a qualification of such contract limiting liability to the initial line.

Thus it is decided that the purpose and effect of the statute was such as to forbid the initial carrier to relieve itself from responsibility for the negligence of a connecting carrier.

If this is correct, it restores all the severity which that court formerly eliminated from the statute in order to sustain its validity, and we are thus brought again to face the question of the constitutionality of this law. The court evidently fully appreciated this position, because in the concluding portion of the opinion it undertook to justify the statute by holding that it was not obnoxious to the criticism that it was unconstitutional under that provision of the Federal constitution which reserves to Congress the right to regulate commerce between the States. In reaching the conclusion that this law was constitutional, the court again assumed the very point that is in issue, i. e., that the defendant had made the Wabash Railroad its agent to complete the transportation. If this is not correct, as I think I have shown it is not, then the statute stands under the present construction as one arbitrarily imposing upon the initial carrier responsibility for the negligence of succeeding carriers.

It must be conceded that, while the Dimmitt case did not say so in terms, yet it was a practical admission that unless the court had adopted the construction which it did, the law would have been held void. In Texas a very sim-

ilar statute was upheld by the court's construing it to apply only to shipments within the State, thus conceding that if it had applied to interstate shipments, it would have been void.

> Sherwood *v.* R. R., 84 Tex. 125 (19 S. W. Rep. 455).

The statute is a regulation of commerce, because it prescribes a new rule for the government of persons engaged in the business of transportating goods from one place to another, and it certainly applies to and affects interstate commerce because, by its terms, the statute is made to operate upon shipments made to points "either within or without this State."

In Gibbons *v.* Ogden, Chief Justice Marshall said:—

> "To regulate commerce is to prescribe the rule by which commerce is to be governed." (9 Wheat. 163.)

In Leisy *v.* Hardin, 135 U. S. 100, this court said, in referring to various decisions, that they were

> "clear to the effect that neither licenses, nor indirect taxes of any kind, *nor any system of State regulation* can be imposed upon interstate commerce any more than upon foreign commerce, and that all acts of legislation producing *any such result* are to that extent unconstitutional and void."

And in Hall *v.* DeCuir, 95 U. S. 485, this court said: —

> "But we think it may safely be said that State legislation which seeks *to impose a direct burden* upon interstate commerce, or to *interfere directly with its*

freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the State, but directly upon the business as it comes into the State from without, or goes out from within. While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. It was to meet just such a case that the commercial clause in the constitution was adopted."

In Wabash Ry. Co, *v.* Ill., 118 U. S. 557, this court had under consideration a statute prohibiting a railroad from charging more for the transportation of passengers and freight for any distance within that State than might be charged for similar service for a greater distance over the same road. This court held that it would follow the construction of the statute by the State court making it applicable to shipments originating in Illinois destined to points in other States, and that, under that construction, such transportation was commerce among the States, even as to that part of the voyage which was wholly within the State of Illinois, and that as to such commerce its regulation was confided exclusively to Congress by the constitution of the United States, and farther that a statute of a State intended to regulate, or to tax, or to impose any other restriction upon the transmission of persons or property from one State to another is not within that class of legislation which the State may enact in the absence of legislation by Congress; and that such statutes are void, even as to that part of such transmission which may be within the State. The law of Illinois was therefore held to be void. In that

case the court quoted with approval from the case of Hall *v.* DeCuir, p. 571. It is to be noted that the statute under consideration in that case only purported to control or regulate the transportation within the State of Illinois, and this, together with the absence of congressional legislation, was made the basis of a dissenting opinion, which does not, however, destroy the force of the opinion of the majority as applicable to the case at bar. The statute involved in that case was a regulation of railroads in the discharge of their public duties as carriers, which is not the nature of the law involved in the case at bar, because there was no public duty resting upon a carrier to transport beyond its own line.

In R. R. *v.* Illinois, 163 U. S. 142, this court held to be unconstitutional a statute of Illinois requiring railroad companies to stop their trains (which the State court held to include fast mail trains) at county seats long enough to receive and let off passengers with safety. This was held to be unconstitutional both because it was a hinderance and obstruction to interstate commerce and the passage of mails of the United States.

The statute now under consideration, as already stated, is made to apply to business between the States. In fact it is so drawn that there never would be any question about its applicability to carriers whose domicile and line were entirely without the State of Missouri. It is not even limited to the receipt of goods or to the issuing of bills of lading in that State which may contemplate transportation out of the State. It would be equally applicable to a carrier out of that State issuing a bill of lading or receiving goods from some other State into that State; or, as is sometimes done, to a carrier having its line out of that State issuing a bill of lading from some point upon another line in that State to be transported to a point out of the State.

If it is true, then, as said by this court, that "any

statute which seeks to impose a direct burden upon interstate commerce, or interfere directly with its freedom, does encroach upon the exclusive power of Congress," then this statute conflicts with the constitutional provision reserving such matters to Congress. The conclusion cannot be avoided that it interferes with the freedom of commerce and inposes a burden upon it to abrogate an old rule and establish a new one which assumes to make one carrier liable for the negligence and default of another.

In the opinion delivered by Division No. 2 in this case, Rec., p. 68, the view was expressed, and supported by abundant authority, that this statute was a regulation of commerce, and that if it was construed as being operative beyond the boundaries of Missouri, it was unconstitutional. Certainly, that conclusion of three of the members of that court, founded upon the authority there cited, was worthy of some notice, at least, when the court undertook to assert a different conclusion, upon the strength of much weaker authority. Again, that court in the case of Grimes *v.* Eddy, first, in Division No. 2, 27th Southwestern, 479, and subsequently through the court *in banc*, 126 Mo. 168, and then again in Selvege *v.* R. R., 135 Mo. 163, held that sections 953 and 954 of the statutes of 1889 were void as an attempted regulation of interstate commerce. That was a statute which placed upon the carrier the burden of responding in damages for any losses occasioned by the transportation of Texas cattle into or through the State of Missouri. That statute limited the freedom of commerce in transporting such articles of commerce through the State. Is there any difference, I ask, between such a burden and such a limitation upon the freedom of the carrier and that which imposes the burden of responding for the negligence of some one else?

Again, in the case of Stanley *v.* Wabash Ry., 100 Mo. 435, the Supreme Court of Missouri held that a statute

which required railroad companies to furnish double-deck cars for the shipment of sheep and providing a penalty for failure to do so, so far as it was attempted to be applied to interstate shipments, would be a regulation of commerce and a violation of the Federal constitution. Again, I ask, is there any difference in effect between the burden there imposed and the limitation thus placed upon the freedom of the carrier and that which is attempted to be done by section 944 in putting upon the initial carrier the burden of the negligence of a connecting carrier, and in limiting the carrier's freedom to receive and contract for its part of the transportation of freight destined to a point beyond its own line?

The cases relied upon by the Supreme Court of Missouri to sustain the validity of the statute in question seem to proceed upon the theory that a law to be void as a regulation of interstate commerce must be one fixing rates or imposing restrictions. Whether the Missouri court meant to impose any such limitation we can only determine from the fact that it relied upon such authority only. Such, however, is not the law, as appears from the cases above cited.

In the last opinion in the case at bar the court says:—

> "The act in no way operates as a regulation of trade and business among the States. No burden or restriction on transportation is imposed. Carriers are left free to make their own contracts in regard to compensation for their services for transportation between the States subject to congressional regulations.
>
> "The statute merely prohibits a carrier who by contract undertakes to transport property to a point beyond its own route from relieving itself of responsibility for neglect to properly perform its duty. It

only imposes the duty and liability which the law, from consideration of public policy, imposes upon all common carriers in the transportation of property over their own lines, though they may extend into other States.

"A statute of Iowa which provided that no contract of a common carrier should exempt it from its common law liability was held by the Supreme Court of that State not to be in conflict with the commercial power of Congress prescribed by the constitution."

There is no theory upon which the first clause above quoted can be justified unless it be that a requirement of a statute is not a regulation of commerce unless it affects the compensation which may be charged. That was undoubtedly the view of the Missouri court, because it says: "Carriers are left free to make their own contracts in regard to compensation," thus impliedly saying that they are not free to make contracts in regard to other matters, and in fact that is what had previously been decided by the court in regard to the stipulation limiting liability in the case at bar. Then, in farther explanation of its position in sustaining the validity of the law, the court characterizes the statute as one which prohibits a carrier from relieving itself of responsibility for neglect to properly perform its duty, and, in support of that, refers to the Iowa decisions, which hold that a law forbidding contracts exempting carriers from common law liabilities are not unconstitutional. This shows the scope of the view taken by the Supreme Court of Missouri of the question of the constitutionality of the statute under consideration. Other cases similar to those cited from Iowa may be found, and, regardless of what opinion may be held concerning them, it is sufficient to say that the statute now in question is not at all similar to the ones there passed upon. Those were

statutes which prohibited exemptions from common law liability. So far as common law liability arising from the carrier's own negligence is concerned, these statutes were wholly unnecessary, because the settled law was that contracts exempting from liability for such negligence were nugatory independently of such statutes. A carrier's common law liability of any kind arises from its character and its public duty, and is not in any manner dependent upon the contracts that it may make. As has already been shown, however, the transportation by a carrier beyond the terminus of its own line is purely a matter of contract not arising out of any public duty. It is not a service which the carrier must render unless it wishes to do so. It is purely voluntary. There is no question of public policy involved. Therefore, a statute imposing the burden of such service upon it, or one imposing the burden of liabilities in consequence of such service voluntarily assumed regardless of the stipulations of the contract through which alone such extra service is to be rendered is not to be treated as a statute prohibiting exemption from a duty already existing, or from a liability already resting upon the carrier. In the case at bar, however, the court evidently fell into the error of first assuming that this duty of extended transportation was imposed upon the carrier, and that therefore the act in question was to be regarded as similar in effect to statutes forbidding exemption from common law liability.

But whatever may have been the theory upon which the court proceeded, the result is that Sec. 944 of the Revised Statutes of Missouri is construed by the Supreme Court of that State as applying to shipments originating in the State of Missouri destined to points in other States. Such business, under the decisions of this court, is "commerce among the States." And farther, under the construction of the State court, the statute imposes upon the initial carrier liability for loss or damage resulting from the acts of

a subsequent carrier, and forbids any contract limiting such liability. Under the decisions of this court such an enactment is a regulation of commerce. It is the imposing of a burden which did not exist under the common law nor under the decisions of the State of Missouri before this statute was enacted, and, with the above propositions settled, it follows that the law must be held to be unconstitutional as being a regulation of interstate commerce. In concluding this argument, I can do no better than to again ask the attention of the court to the opinion first filed in this case and set forth in the transcript of the record at pages 68 to 71. It is worthy of comment that in the last opinion, so at variance with the general rules upon the several points, the court should have entirely lost sight of the former decisions in this case, and to have entirely failed to mention in any manner the former opinion by Justice Sherwood in which the views of the court and its decision were expressed in such lucid and concise manner, and where, among other things, it was said: —

> "Moreover, if section 944, *supra*, is to be construed as being operative beyond the boundaries of this State, then it is plainly a regulation of interstate commerce, and therefore violative of section 8 of article 1 of the Federal constitution. Stanly *v.* Railroad, 100 Mo. 435.
>
> "Any rule pertaining to the transportation of passengers or merchandise from one State to another is a regulation of interstate commerce, and, therefore, under the prohibitions of the Federal constitution, a State is inhibited from making such regulations. Case of the State Freight Tax, 82 U. S. 323.
>
> "In order to conspicuously show that the statute construed as plaintiffs desire is plainly such a forbidden

regulation, it is only necessary to suppose that the State of Illinois should enact laws in reference to merchandise transferred to that State from this State, and at variance with section 944 aforesaid. As is aptly elsewhere said, 'Commerce cannot flourish in the midst of such ambarrassments.' Hall *v.* DeCuir, 95 U. S. 485. See also Gibbons *v.* Ogden, 9 Wheat. 1; Pickard *v.* Pullman, 117 U. S. 34; Hardy *v.* Railroad, 18 Am. & Eng. R. R. Cas. 432; Carton *v.* Railroad, 59 Iowa, 148; Louisville *v.* Com'rs 16 Am. & Eng. R. R. Cas. 1.

"For the foregoing reasons, as it is evident that plaintiffs have no standing in court, the judgment will be simply reversed. All concur."

That view, I submit, should now prevail in preference to the last expression of the State court, and the judgment heretofore rendered sustaining the validity of this statute should be reversed.

GEO. P. B. JACKSON,
For Plaintiff in Error.

Supreme Court, U.S.
FILED
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JAMES H. McKENNEY
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No. 11.

Brief of Jackson for P. E.

Filed Oct. 7, 1898.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
PLAINTIFF IN ERROR,
vs.
WILLIAM C. McCANN AND MILTON D. SMIZER, PARTNERS UNDER THE NAME OF McCANN & SMIZER.
No. 11.

In Error to the Supreme Court of the State of Missouri.

ADDITIONAL ARGUMENT FOR PLAINTIFF IN ERROR.

GEO. P. B. JACKSON,
For Plaintiff in Error.

Nixon-Jones Printing Co., 215 Pine St., St. Louis.

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ADDITIONAL ARGUMENT FOR PLAINTIFF IN ERROR.

Upon the occasion of the argument of this case at the last term a manifest effort was made by counsel for the defendant in error to avoid the consideration of the validity of the Missouri statute in

question, by contending that the contract of shipment involved was in itself an absolute and unconditional special contract, assuming the obligations and liabilities of a common carrier throughout the entire distance from Stoutsville, Missouri, to Chicago, Illinois. This subject was considered in the original brief and argument of the plaintiff in error beginning at page 27, and it is only considered necessary at this time, by way of answer to this contention of the defendant in error, to refer generally to those circumstances of law and fact which, we think, entirely refute this contention.

First. The authorities heretofore cited clearly establish that a railway company is not a common carrier beyond the termini of its road, and is under no duty to carry for anyone beyond its own road, and no question of public policy is involved in its doing or refusing to do such additional business, nor in any stipulation that may be made concerning the same. It is purely a matter of contract between the proposed shipper and the carrier whether the latter shall undertake any service beyond the termini of its road. Its obligation to carry and any liability arising from an improper discharge of such obligation depend entirely upon a special contract on that subject, either express or implied.

As has been decided by this court: —

> "In the absence of a special agreement to that effect, such liability will not attach, and the agreement will not be inferred from doubtful

expressions or loose language, but only from clear and satisfactory evidence."

Myrick v. R. R., 107 U. S. 102;
R. R. v. Mfg. Co., 16 Wall. 318, 324;
R. R. v. Pratt, 22 Wall. 123.

And to the same effect are the decisions of the Supreme Court of Missouri.

Coates v. Express Co., 45 Mo. 238;
Snider v. Express Co., 63 Mo. 376;
Sewing Mach. Co. v. R. R., 70 Mo. 672.

Second. The contract involved in this case cannot, under the rules of construction, be regarded as a special agreement assuming the duties and liabilities of a common carrier beyond the terminus of the Missouri, Kansas & Texas Railway. The defendant in error singles out one clause in the contract, and, in utter disregard of every other portion of the written instrument which was signed by both parties, construes it to be a special contract assuming the obligation and liability of a carrier to the point of destination.

That clause reads: —

"Now, therefore, for the consideration and mutual covenants and conditions herein contained, said party of the first part is to transport for the party of the second part the live stock described below and the parties in charge thereof, *as hereinafter provided:* namely, six

cars said to contain 95 head of cattle, from Stoutsville Station, Missouri, to Chicago, Illinois, Station."

Regardless of what would be a proper construction of that clause if it stood alone, it is certainly very materially qualified by what follows. Undoubtedly the use of the words "as hereinafter provided," had some significance, and they referred to the stipulations that were to follow in the contract. When we act upon the suggestion of these words "as hereinafter provided," and look to the other parts of the contract, we find, in the very sentence in which it is said the carrier is to transport the cattle, the qualification that it is to be done for the consideration of the mutual covenants and *conditions* herein contained, showing at the very outset that the contract was not to be absolute and unconditional, but that it was expressly stated that the transporting of the cattle was involved with conditions. Then, in the clause following the general stipulation for transportation, the shipper released the railroad company from the liability of common carrier, and agreed that the liability should be that of a mere *forwarder* or private carrier for hire. We do not contend that so far as its own road was concerned a carrier could by such stipulation relieve itself from the duties and obligations of a common carrier. Those are imposed upon it by public law, and it would be against public policy to allow it to stipulate against the full effect of these duties and obligations imposed by law.

But, as established by the authorities cited in the original brief, there is no public duty or obligation resting upon the railroad company concerning transportation of property beyond its own line. There is no public law which requires it to carry beyond its own line. Whether it shall assume any obligations or liabilities in that respect depends entirely upon whether or not it makes a special contract for that purpose, and however it may contract, and whatever stipulations it may enter into, they do not involve any question of public policy pertaining to common carriers. Therefore, the stipulation in this first paragraph, although inoperative as to the transportation over its own railroad, is entirely valid with reference to what the railroad company might do beyond the terminus of its road. Hence, the stipulation that its liability should be that of a mere forwarder was a qualification of the duty and liability that it assumed with reference to the transportation of the cattle beyond its own line. It was a common carrier in every sense of the term, with all the liabilities pertaining thereto, from Stoutsville to Hannibal, but from Hannibal to Chicago it was only a forwarder, by reason both of this express stipulation in the contract and of the rule of law thoroughly settled in Missouri,— except in so far as it is modified by the decision in this case now complained of.

In the fourth paragraph of the shipping contract it is expressly stipulated that among other things the party of the first part, the carrier, is released from injuries arising from causes other than and except from its own negligence, and then in the thir-

teenth paragraph is the express stipulation that the party of the first part, the carrier, "shall be released from liability of every kind after said stock shall have left its road, and the party of the second part (the shipper) hereby so expressly stipulates and agrees, the understanding of both parties hereto being that the party of the first part shall not be held or deemed liable for anything beyond the line of the Missouri, Kansas & Texas Railway, excepting to protect the through rate of freight named herein." In the face of these stipulations in the contract it seems idle to contend that this could be a special contract imposing the duties and liabilities of a common carrier throughout the entire distance. All of the stipulations were embodied in the same instrument. All became part of the agreement by the execution of the same instrument, and so far as the making of the contract was concerned no one of the stipulations preceded the other. If there is anything in the rule that every part of a contract is to be considered, and the whole to be construed together, then certainly the limitation upon the liability was as much a part of the agreement as the undertaking to transport the cattle in any manner or by any means.

Third. It is wholly immaterial what contention may be made in that respect, because the Supreme Court of the State of Missouri, in rendering the decision now complained of, as well as in the previous opinion filed in this case, has repudiated this contention of the defendant in error, and

has only given the contract the effect of one for through transportation by reason of the force of the statute as interpreted by the court.

At the very outset of the last opinion that court said:—

> "As the contract must be construed so as to give proper effect to the statute, the interpretation of Sec. 944 in its application to the contract is also necessary."

Again, in attempting to limit the effect of their previous decision in the case of Dimmitt v. R. R., 103 Mo. 433, that court said: —

> "This ruling was in accord with the decisions of the English courts, but under the law as it existed in Missouri prior to the statute, upon the facts shown to have existed the receiving company would not have been liable for the loss."

It is proper and necessary, therefore, that we commence our consideration of this case with the assumption, — so manifest from the terms of the contract itself, and so clearly expressed by the Missouri court, — that, but for the effect of this statute, there would have been no liability, and therefore if the statute transcends the power of the State as a regulation of interstate commerce, the judgment in this case must be reversed.

Since, then, the Supreme Court of the State of Missouri has decided that but for the statute in question the contract as made by the parties would

have been enforced, and therefore this plaintiff in error could not have been held responsible for the default of the connecting carrier, and since that court has interpreted the statute of Missouri as forbidding such qualification of the contract as would limit the carrier's liability to its own line, and farther interpreted the statute as imposing a liability upon the first carrier for the negligence of the other, and as declaring a conclusive liability in such case, it is only necessary that we should farther consider whether the change in the method of doing the business accomplished by this statute is to be regarded as a regulation of interstate commerce, and therefore in violation of the constitution of the United States.

Since this case was last before the court, the case of Richmond & Alleghaney R. R. Co. v. R. A. Patterson Tobacco Co., 169 U. S. 311, has been decided by this court. While the statute construed in that case was materially different from the one now under consideration, yet the reasoning of the case has a direct bearing upon the questions in this case, and I submit should result in a decision favorable to this plaintiff in error. A statute of Virginia was sustained in that case for the reason that as construed and applied by the State court it could not be regarded as a regulation of commerce because it was expressly held that the Virginia law sanctions a contract made by a carrier to limit its liability. It was farther held that the Virginia statute, without placing any restriction upon contracts that might be entered into by

carriers, simply established a rule of evidence fixing the character of proof by which a carrier might show that it had limited its liability. A comparison of the statutes of the two States of Virginia and Missouri will show the radical difference between them. The Virginia statute only provided that a carrier who accepted goods for transportation beyond the terminus of his own line should be deemed thereby to assume an obligation for the safe carriage to destination unless at the time he was exempted from such liability by contract in writing signed by the shipper. The Missouri statute provides that the carrier receiving property or issuing bill of lading for transportation to any point either in Missouri or in any other State, shall be liable for any loss, damage or injury to such property caused by its negligence or the negligence of any other common carrier. There is no recognition in the terms of the statute of any qualification or limitation of this liability, as there is in the Virginia statute, and in the opinion of the Supreme Court of the State now complained of it is, as already shown, expressly decided that in such case this statute declares a *conclusive liability*, because as is stated in that opinion, "the statute forbids such qualification of the contract." The decision in the Virginia case puts the subject in very much the same situation in which it was left by the decision of the Supreme Court of Missouri in the case of Dimmitt v. R. R., 103 Mo. 433. In that case the statute was attacked as being unconstitutional, because it was a regulation of interstate com-

merce. Tacitly conceding the force of this criticism, if the statute was construed as it previously had been in the State, the court, in the Dimmitt case, in order to avoid holding it invalid, construed the statute as being one changing the character of proof, and therefore relating only to the subject of evidence. It was therefore decided that this statute was intended to modify the previous rule as to the necessary proof of a special contract to hold a carrier liable for loss beyond its own line, by enacting that the receipt of goods or the issuing of a bill of lading for transportation beyond the carrier's line was thereafter to be regarded as sufficient evidence of a contract assuming liability beyond its own line. As thus interpreted, the statute did not in any manner restrict the right of the carrier to limit the liability to its own line.

It was said in the Dimmitt case, 103 Mo. 442:—

> "By its (the statute's) provisions, the act of acceptance by a common carrier of property to be transferred to a place beyond the terminus of its route is *evidence* of a contract to carry such property to the place of its destination. The act of issuing a receipt or bill of lading of property to be transmitted to a place beyond the terminus of the road of a common carrier *is evidence of a contract* by such carrier to carry such property to the place of its destination. This *prima facie* case the statute makes for the plaintiff on the facts stated. In order to defeat it, the defendant must show that by specific agreement it only contracted to carry the property to the terminus of its own line, or, what is

> equivalent, that there was a specific agreement that it was to be liable only for loss or damage occurring on its own line."

This construction of the Missouri statute was acquiesced in and followed for some time, as shown by the cases cited under Point VI of the original brief, and as long as that interpretation was followed the statute was in its effect the same as the Virginia law, and with that interpretation and effect it could not be objected to as a regulation of commerce. Under that interpretation the same right was reserved to the carrier to limit his liability as was given by the Virginia statute, and by the interpretation put upon that statute by the Supreme Court of Virginia. The decision of the Supreme Court of Missouri in the Dimmitt case was equivalent to a ruling that if any other interpretation had been given to the statute it would have rendered it obnoxious to the Federal constitution. The two interpretations given to this aw by the Supreme Court of Missouri must not be confused. The former decisions in the Dimmitt and succeeding cases emphasizes the construction afterwards put upon the statute in the opinion now complained of. As already shown, the statute under this latter interpretation, which is complained of, is not limited to a modification of the rules of evidence, as it was in the Dimmitt case, or as the Virginia statute was construed, but the interpretation now put upon it expressly excludes any such purpose of the law, and says that the intention of the statute was to fix a conclusive liability, and to forbid any limitation of the same.

Among other things the opinion says upon this subject:—

> "The statute does not undertake to change the law in respect to liability of a carrier for his own negligence, but to extend it to connecting carriers as well, and to declare a liability for negligence without regard to which was in fault."

This interpretation of the law takes the Missouri statute entirely beyond any sustaining influence of the opinion of this court in the Virginia case. In that case this court pointed out the distinction between the substance of the agreement upon which the minds of the parties met, and the mere evidence by which such agreement might be proved, and it was shown that the statute there in question only assumed to regulate the evidence by which a contract might be established.

In that case the court used this language:—

> "It is manifest that the statute of the State of Virginia in question does not attempt to substantially regulate or control contracts as to interstate shipments, but simply establishes a rule of evidence ordaining the character of proof by which a carrier may show that although it received goods for transportation beyond its own line, nevertheless by agreement its liability was limited to its own line. That this is the sole purpose of the statute seems too plain for anything but statement. It leaves the carrier free to make such limitation as

> to liability on an interstate shipment beyond its own line as it may deem proper, provided only the evidence of the contract is in writing and signed by the shipper. The distinction between a law which forbids a contract to be made and one which simply requires a contract when made to be embodied in the proper form is as obvious as is the difference between the sum of the obligations of a contract, and the mere instrument by which their existence may be manifested."

That of course does not commit this court to holding that the converse of any part of that statement is true, yet I submit it is a fair deduction from what is there said that if a statute goes beyond the mere matter of evidence and fixes a conclusive liability regardless of what the parties stipulate, and forbids any limitation upon that liability, and does not leave the carrier free to make such contract as it may deem proper concerning its liability on an interstate shipment beyond its own line, then we have a law whose purpose is too plain for anything but statement, and that purpose, as decided by the Supreme Court of Missouri, is, not to fix the character or quantity of evidence required, but to impose a liability upon the initial carrier for any loss sustained, even beyond his line, regardless of which is at fault,—to fix "a conclusive liability" upon the initial carrier for the negligence of a connecting carrier, even in another State, and to forbid any attempt to modify or limit such liability, and annulling any stipulation that may be entered into for that purpose. That is a contract which clearly

falls under the first branch of the distinction suggested by this court as existing "between a law which forbids a contract to be made and one which simply requires the contract when made to be embodied in a particular form." While the Virginia case is not necessarily conclusive of the case at bar, I submit it is a strong authority in support of the contention of the plaintiff in error.

Upon the former hearing of this case the inquiry was made whether or not under the decision complained of, the Missouri statute did not leave the carrier free to limit its liability. To that question I answer: In a certain literal sense, yes; with any practical effect, no. To understand clearly the position of the Supreme Court of Missouri we must again refer to the decision in the Dimmitt case. In that case the court decided that the statute regulated the evidence by which contracts limiting the liability might be established, and there it was said that "in order to defeat the *prima facie* case made by the statute from the mere acceptance of the goods for through transportation, the carrier must show that by a specific agreement it only contracted to carry to the terminus of its own line, *or what is equivalent, that there was a specific agreement that it was to be liable only for loss or damage occurring on its own line.*" When the same court came to consider this statute in the present case, it held that the part of the above quotation reading "or, what is equivalent, that there was a specific agreement that it was only to be liable for loss or damage occurring on its own line" was mere dictum,

and that part of the former opinion was repudiated, and therefore the so-called recognition of the right to limit the liability beyond the carrier's own line was restricted to the right to make a contract for carriage only upon its own line. It is patent upon the mere statement that this accords no right at all, because there can by no possibility be any liability beyond the carrier's own line if he only contracts to carry over that line, and therefore all the right that is reserved, if it may be considered such, is the right to avoid liability upon any other line by refusing to make a contract for carriage over such other line. That is, a carrier who might engage in interstate transportation over his own and other lines may avoid liability for loss occurring on those other lines by contracting to carry only over his own line, or in other words by withdrawing from the business of interstate transportation. There was no occasion for the statute in order that the carrier might have a right to restrict his liability by simply contracting to carry over his own line. There is no pretense anywhere that there was any law which required the carrier to make a contract beyond his own line. That right existed independently of the statute, and therefore I say, in farther answer to that inquiry, that the Missouri statute, as now construed by the Supreme Court, amounts simply to one of two things. Either it is a prohibition upon a carrier's receiving property or issuing bills of lading for transportation beyond its own line, or it is an imposition of absolute liability upon the carrier, which receives the freight or issues the bill of lading for such trans-

portation, for any loss that may occur whether upon its own or some other line. Under this interpretation, the right to limit the liability beyond its own line does not exist with any practical effect, because there can be no limitation upon the liability in any case where there is to be transportation beyond the original line.

This leaves as the only question to be considered: Does this statute, which is construed as prohibiting any limitation upon the liability when the transportation is beyond the terminus of the line of the receiving carrier, amount to a regulation of interstate commerce?

Since the former argument of this case, this court has also decided the case of Chicago, Milwaukee & St. Paul R. R. Co. v. Solan, 169 U. S. 133. An Iowa statute, to the effect that no contract, receipt, rule or regulation shall exempt any corporation engaged in transporting persons or property by railway from the liability of a common carrier or carrier of passengers which would exist had no contract, receipt, rule or regulation been made or entered into, was sustained in that case. The cause of action upon which that suit was brought arose within the State of Iowa.

Referring to various statutes which were in the nature of police regulations, this court said: —

> "So long as Congress has not legislated upon that particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative

rights and duties of all persons and corporations *within its limits.*"

And then speaking of the Iowa statute, the court said, at page 138 of the report: —

> "The statute now in question, so far as it concerns liability for injuries happening within the State of Iowa,— which is the only matter presented for decision in this case,— clearly comes within the same principle and it is in no just sense a regulation of commerce. It does not undertake to impose any tax upon the company, or to restrict the persons or things to be carried, or regulate the rate of tolls, fare or freight. Its whole object and effect are to make it more sure that railroad companies shall perform the duty resting upon them by virtue of their employment as common carriers to use the utmost care and diligence in the transportation of passengers and goods."

Contrasting the case at bar with the one there decided, we find a difference in all the essential particulars. This was not intended to regulate the relative rights and duties of persons and corporations *within* the limits of the State of Missouri. It did not only concern the liability of the carrier for injuries happening within the State of Missouri. Its object and effect were not to make more sure that the plaintiff in error would perform any duty resting upon it by virtue of its employment as a common carrier, nor to exact of it more care or diligence in the transportation of passengers and goods. It transcended all these matters, and assumed to impose a liability upon

this carrier, not for anything that it might do or fail to do in the State of Missouri, but for the negligence or omission of another carrier in the State of Illinois. It was not an attempt to exercise the police power of the State of Missouri by regulating the relative rights and duties of persons and corporations within that State. It was an assumption of power with reference to what might be done or what might be omitted to be done in the State of Illinois, by fixing a liability upon a party in the State of Missouri. The statute could in no manner improve the service of a carrier in Missouri by making it liable for the fault of another carrier in Illinois. No matter how latitudinous the doctrine of "police power" may be, I think we may safely assert that it has never been extended so far as that a State may exercise that power by legislating for the control of any sort of business in another State. Certainly the police power of the State of Missouri is limited by the boundaries of that State, and when this statute assumed, as it does by its terms, to fix the liability on account of what might occur "within or without this State (Missouri)," it stamped the legislation as something wholly different from the exercise of the police power of the State of Missouri.

Another view of the statute shows that it was not intended, and cannot be justified, as a police regulation. Certainly, in addition to being confined in its effect to the State in which it was enacted, a law designed as a police regulation should relate to the performance of some duty or the protection of some

right existing under the general laws of that State. As already suggested, this law was neither designed, nor does it have the effect, to insure a proper discharge of any duty which the Missouri corporation owed, but, as decided by the Supreme Court of Missouri, in the opinion now under consideration: —

> "The statute does not undertake to change the law in respect to liability of a carrier for his own negligence but to extend it to the connecting carriers as well, and to declare a liability for negligence without regard to which was in fault."

Which means only that the statute does not attempt "to make it more sure that railroad companies shall perform the duty, resting upon them by virtue of their employment as common carriers, to use the utmost care and diligence in the transportation of passengers and goods," but instead, and notwithstanding they were entirely without fault in the discharge of the duties resting upon them, to make them responsible for the negligence of some other carrier. Unlike the Virginian statute before mentioned, and unlike the construction heretofore put upon this statute in the Dimmitt case, it does not, by prescribing a rule of evidence, bring the initial carrier into the attitude of having entered into a contract assuming the responsibilities of a carrier throughout the entire distance. This Missouri statute does not deal with the subject as though the first railroad company had become the carrier throughout the distance. On the contrary

it recognizes the participation of two distinct agencies in the completion of the transportation, and provides that the one which may be subjected to the burdens of the statute shall have a right of action against the other, which was within the contemplation of the statute, although it was entirely beyond the confines of the State of Missouri. This clearly establishes that, in so far as this law can be said to have any feature of a police regulation, it assumes to operate upon an agency beyond the jurisdiction of the State. We may, I think, dismiss any idea that this might be regarded as a police regulation, and if it is not that then it seems impossible to consider it in any other light than as a regulation of commerce. Whatever it is, there is no question that it relates to commerce between the States. The statute by its terms is made to apply to shipments to points "either within or without" the State of Missouri, and the Supreme Court of that State, in this present case, applied it to a shipment originating in the State of Missouri, and destined to a point in the State of Illinois. Both by its terms and its application it relates to commerce between the States.

If we are right in what has been said up to this time, then it must be regarded as a *regulation* of commerce. Of course we do not contend that everything that applies to commerce or affects it indirectly is to be considered a regulation of commerce. Nor do I know that there is a case decided by this Court which is exactly like the present one, and in view of the great care with which this court has restricted its various decisions to the particular ques-

tions before it from time to time, it is not probable that we can cite a case which is so conclusive in its statement of the law as to render nothing more than the citation necessary.

Perhaps the most comprehensive statement of the law upon the subject is that of Chief Justice Marshall in Gibbons v. Ogden, 9 Wheat. 163, where he said: "To regulate commerce is to prescribe a rule by which commerce is governed." Certainly the statute now in question prescribes a rule for the government of commerce. But for this statute, the business would have been conducted in a different way, with different responsibilities and different liabilities upon the part of the carrier. Law is a rule of action, and a regulation is but fixing a rule. To make a new rule is to regulate. To enact a law which creates a new rule is a regulation — especially when it does not come within the exercise of the police power of the State. A new law or a new rule which requires the abandonment of previous methods and the substitution of new ones, and the incurring of entirely different liabilities on account of the doing of a particular thing, cannot well be designated as anything other than a regulation of that thing. As already shown, under the restrictions of the last decision of the Supreme Court of Missouri, there can be no possible limitation upon the liability on account of a shipment partly over a railroad in Missouri and partly over a railroad in Illinois, because it is said that the only way that the liability can be limited is by restricting the contract for carriage to the line

of the receiving carrier. The meaning and the effect of the statute as now interpreted by the Supreme Court of the State is either that the receiving carrier must not enter into any contract or receive any freight for transportation beyond its own line, or that it must be held conclusively liable for the negligence of the connecting carrier. Upon the one hand this is an absolute prohibition against transportation over connecting lines, while on the other hand it results in a conclusive liability for the defaults of a connecting carrier. Certainly if this is anything, it must be a regulation. Let us consider the first branch as it is presented by the decision of the State court, that is, an inhibition upon the extended transportation. Can it seriously be urged, if a statute provided that no railroad company should receive freight or issue bills of lading for transportation beyond the terminus of its own road, that such law would be a regulation of commerce? And if the statute was so broad that the prohibition extended to transportation from one State to another, could it be urged that that was not a regulation of interstate commerce? Again, if a statute said that there should absolutely under all circumstances be a conclusive liability upon the receiving carrier for all defaults and negligence of a connecting carrier, and that, whenever freight was received or a bill of lading issued for such extended transportation, there could be no limitation whatever upon such liability, and that any stipulation in the contract attempting such limitation was absolutely void, could it then be

urged that that was not a regulation, and if the extended transportation was from one State to another, would it not be a regulation of interstate commerce? Is not this what was impliedly decided by this court in the case of Richmond & Alleghaney R. R. Co. v. Patterson Tobacco Co.? Although it was stated in that case that the court did not express any opinion as to whether or not such a law would be a regulation of interstate commerce, is it not fairly deducible from the reasoning of the court in the case that it would be? We have the benefit of the opinion of the Supreme Court of Appeals of the State of Virginia, in that case, which conceded that if the law had denied the right of the carrier to limit its liability it would have been such regulation. If it is a regulation to prohibit interstate transportation over connecting lines, and if it is a regulation to impose and fix liability without the right to limit the same on account of interstate transportation over connecting lines, certainly it does not cease to be such regulation because these two regulations may be involved in the alternative in the same statute. It is none the less a regulation of commerce, that the burden imposed is coupled with the privilege of avoiding it by refraining from engaging in that business. In addition to the cases cited in the original brief upon the subject of what is a regulation of commerce, I cite the case of Western Union Telegraph Co. v. Pendleton, 122 U. S. 347. Certain statutes of Indiana required that telegrams should be delivered with impartiality, and in the order in which they were received under a

penalty in case of failure so to do. A message was sent from a point in Indiana to a point in Iowa. Suit was brought to recover the penalty of $100 because the statutes had not been observed.

The view of the court is concisely and sufficiently stated in the syllabi as follows:—

> "The statutes * * * are in conflict with the clause of the constitution of the United States which vests in Congress the power to regulate commerce among the States, in so far as they attempt to regulate the delivery of such dispatches at places situated in other States.
>
> "The authority of Congress over the subject of commerce by telegraph with foreign countries or among the States being supreme, no State can impose an impediment to its freedom, by attempting to regulate the delivery in other States of messages received within its own borders.
>
> "The reserved police power of a State under the constitution, although difficult to define, does not extend to the regulation of the delivery *at points without the State* of telegraphic messages received within the State; but the State may, within the reservation that it does not encroach upon the free exercise of the powers vested in Congress, make all necessary provisions in respect of the buildings, poles and wires of telegraph companies *within its jurisdiction*, which the comfort and convenience of the community may require."

That in that case the carrier was a telegraph company can make no difference. If the law of Indiana

could not control the transaction of the business in Iowa, and if because it attempted to do so it was a regulation of commerce among the States, then certainly the law of Missouri should not be allowed to control the transaction of the business of railroad carriers in the State of Illinois, and when it attempts to do so it too should be held void as a regulation of commerce among the States. If the power of regulation in regard to the telegraph company was confined to the jurisdiction of the State which assumed to enact laws, certainly the same limitation should be put upon laws which assume to regulate transportation by railroad companies. Nor does it make any difference that in the one case a specified penalty was named. It does not change the nature of the attempted regulation that in one case it is provided that the carrier by telegraph should pay a penalty of $100 and in the other case the carrier by rail should pay a penalty of all the damages arising from the default of a connecting carrier.

Moreover the Indiana statute which this court held void as a regulation of interstate commerce, only assumed to hold a telegraph carrier for its own default, while the Missouri law declares a liability against a railroad carrier on account of the default of another.

Another view of the question was suggested by any inquiry of the court concerning the effect of the interstate commerce law. I think now that the view I was inclined to take of the matter at that time was too restricted and unnecessarily unfavorable to the plaintiff in error. I think it was correct

enough to say that the interstate commerce law does not of itself control this case, because it does not compel any railroad company to engage in interstate commerce; but upon farther reflection I am satisfied that the proper view of the matter is that a railroad company having entered upon the transaction of interstate business in connection with other lines has put itself and its business in a position where there is a necessary conflict between the State statute and the act of Congress regulating commerce. By section 6 of that act the right of connecting carriers to unite and fix joint rates for the transportation of freight from one State to another is clearly recogized, and the spirit and effect of that section are to bring such carriers as desire to unite in making joint tariffs under the operation and control of that law. This was clearly settled by this court in the case of Cin., N. O. & Tex. Pac. Ry. Co. v. Interstate Com. Com., 162 U. S. 184.

At page 192 of that case it is said:—

> "But when the Georgia railroad company enters into the carriage of foreign freight by agreeing to receive goods by virtue of foreign through bills of lading, and to participate in through rates and charges, it thereby becomes part of a continuous line, not made by a consolidation with the foreign companies, but made by an arrangement for the continuous carriage or shipment from one State to another, and thus becomes amenable to the Federal act in respect to such interstate commerce."

While the record in this case does not in terms disclose that any joint rate had been agreed upon or filed with the Interstate Commerce Commission, yet it does appear that the live stock contract was for transportation of the cattle from Stoutsville, Missouri, to Chicago, Illinois, and in the clause which limited the liability it was expressly stated that this plaintiff in error was not to be held liable for anything beyond its own line "except to protect the through rate of freight named herein," it elsewhere appearing in the contract that a through rate of 17½c. per hundred pounds was stipulated from Stoutsville to Chicago. With this much affirmatively disclosed, we may invoke the presumption that the parties concerned had discharged the duty which the law had imposed upon them, and that joint tariffs had been agreed upon between the several carriers and had been filed with the commission. The plaintiff in error was therefore amenable to the interstate commerce law. By section 7 of that act it is made unlawful for the plaintiff in error to have in any manner prevented the carriage of the cattle in question from being continuous from the place of shipment to the place of destination. Having become a party to a joint tariff, the plaintiff in error would have violated the interstate commerce law if it had done that which the Supreme Court of the State said was the only thing it could do to avoid liability on account of the default of the connecting carrier. The State court said that the only manner in which the liability can be restricted

to its own line is by restricting the carriage to its own line. The interstate commerce law says that the carriage must be continuous from the point of shipment to the point of destination. Necessarily the interstate commerce act is a regulation of interstate commerce. If it is a regulation of that commerce to say that the transportation must be continuous, certainly it is another and an inconsistent regulation to say that it must terminate at some intermediate point which happens to be the terminus of one of the railroads involved in the transportation. The moving of commodities from one State to another is interstate commerce, whether it be transported over the line of a single carrier or over the connecting lines of several carriers, and even if it be true that one of the connecting carriers operates a road entirely within one State, yet, by virtue of the law of Congress, it is the right of that railroad company to become a part of a through line by an arrangement as to joint rates and charges. Until it is exercised this right is a mere abstraction. Since the right exists it may be exercised effectively, and whatever benefits may arise to the carrier or to the public are to be enjoyed without restriction from any State legislation. It cannot be contended, however, that the right to participate in this interstate business can be enjoyed by the plaintiff in error to the full extent, nor can it serve the public to its full capacity, if it is to be restricted as proposed by this State statute with the interpretation now put upon it by the Supreme Court of Missouri. Clearly it was the policy of Congress to extend to

the commercial world every facility for transportation between the States that might arise through any combination of any number of carriers and it was the intention, as nearly as possible, to put all these carriers engaged in the same sort of business between the same localities upon an equal footing. The burdens imposed by the Missouri statute, as now construed, could not, however, operate equally upon all railroads engaged in interstate transportation between the same points. The burden would be in proportion to the distance that the freight was transported over connecting lines. A railroad, which only carried freight a few miles over its own tracks and then delivered to a connecting line, to be carried for a long distance, would have a much greater risk imposed upon it than another railroad which would carry the freight over its own rails for the greater part of the distance and would only have to assume the risk of loss while the freight was being transported a few additional miles. Moreover, it is the policy of the law that the public should enjoy the benefit of competition between different lines of transportation, and therefore a law which operates to impose burdensome conditions on one hand, or, as an alternative, compel a carrier to withdraw from that business, ought to be considered as against public policy, — because it prevents that much competition. The case in hand is an apt illustration. If the shipper could load his cattle at his home station in Missouri into cars from which they need not be moved until they reached their destination in

Chicago; if he could secure a through rate for the entire distance, which could be settled by his commission merchant in Chicago; and if he could receive a through bill of lading which required no farther attention by him, certainly he has derived a great benefit. On the other hand, if the railroad companies interested in this transportation could avoid the additional handling in unloading and reloading at the point of junction, and if they could avoid the loss of time in the use of their cars which would result if each company had to have a sufficient number on hand to serve the purpose of this shipment, they too have gained an advantage and can afford to transport that much cheaper. But if the initial carrier, with only 30 or 40 miles of haul is denied the right to limit its liability to its own line; if it must remain under a conclusive liability to respond for all damage, that may occur from negligence or delays in the additional distance of several hundreds of miles, it cannot afford to do the business for the small proportion of the freight charge which it will be entitled to, and the effect of the application of this State law would be to drive this plaintiff in error out of that particular business, and in time to drive all other railroad companies in the State out of similar joint business, so that the end of the matter would be that all the companies operating railroads in the State of Missouri would be compelled to withdraw from any joint tariffs, cease to do any interstate business whatever, confine their transactions entirely to commerce within the boundaries of the

State of Missouri, and thereby deprive the people of the State of advantages which the law seeks to secure for them. I submit, then, that this State statute, as now construed by the Supreme Court, is legislation upon a subject upon which Congress has legislated; that its purposes and results are inconsistent with those of the law of Congress; that this act cannot be considered as a mere exercise of the police power of the State of Missouri, but that it is an attempted regulation of the business outside of the State of Missouri, and as such is a regulation of interstate commerce, and therefore the law, as finally construed and interpreted by the Supreme Court of the State of Missouri, must be held to be void, because it is in conflict with the constitution of the United States.

Respectfully submitted,

GEO. P. B. JACKSON,
For Plaintiff in Error.